Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

JOSE J. HOYOS

Petitioner

vs.

UNITED STATES OF AMERICA, DEPARTMENT OF VETERANS AFFAIRS, et al,.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Jose J. Hoyos
Plaintiff
P.O. BOX 440772
Miami, FL 33144-0772

2311

QUESTIONS PRESENTED

1. Whether the moving party, on a Motion for Summary under Rule 56 of the Federal Rules of Civil Procedures, must support its Motion with some evidence even though the opposing party has admissible evidence with which to support its claim.

2. Whether Rule 56 of the Federal Rules of Civil Pro. permits a party to oppose a Motion for Summary Judgment with admissible evidence. Where the litigant was denied its due process right to a fair trial.

3. Whether the lower federal courts posses inherent judicial power to create their own rules for evidence which: (a) exceed those enumerated by Congress in Fed. R. Evid. 402, (b) bypass the procedural safeguard for evidence rulemaking mandated by Congress in 28 U.S.C. §§ 2071-2071, and (c) effect substantive revision of rights granted parties under federal law., in Federal Rules of Evidence enacted by Congress in 1975 eliminated the judge-make "general acceptance".

4. Petitioner will be bar from filing any type of law suit in the District Court, even if Petitioner has a vital claim before the District Court, in direct violation of the Constitution of the United States.

PARTIES

The parties to the proceeding in the United States Court of Appeals for the Southern District of Florida, (No. 95 -2256) were Jose J. Hoyos, individually and on behalf of all other persons similarly situated, Petitioner.

Respondents, Thomas Doherty, Jesse Brown, Wayne Johnson, Juliemer Santiago, Gregory Rhodes, Robert M. Clark, Diane L. Nealy, Arnold Berkowitz, Catherine Byrd, Dr. Anthony Soldo, Larry Brinkman, United States of America Department of Veterans Affairs, individuals and their officials capacity as employees, servant and agents of the Miami Veterans Affairs Medical Center, VA Hospital enterprise, as an agent of the United States Government.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

JOSE J. HOYOS,
Petitioner,

-v-

UNITED STATES OF AMERICA, DEPARTMENT OF VETERANS AFFAIRS, et al.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE TO THE UNITED STATES COURT OF APPEAL'S FOR THE THE ELEVENTH CIRCUIT

DECISION BELOW

The opinion of the Court of Appeals is not published. The opinion of the district court can be found Civ. No. 95-2256 and was entered January 27, 1998. (App. B).

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit ("Court of Appeals") was entered on March 25, 1999, in denied for Petition Rehearing En Banc (App. C).

The Court of Appeals denied a timely petition for hearing and suggestion for rehearing En Banc filed by petitioner on March 25, 1999.

This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTION STATUTORY PROVISION AND RULES INVOLVED

This case involves Rule 56 of the Federal Rules of Civil Procedures, Fed. R. Civ. P. (c), provides in pertaining part:

The Supreme Court in Celotex Corporation v. Catrett, 477 U.S. 317 322, 323, 106 S.Ct. 2548, 2552, 91 L. Ed 2d. 265 (1986), set forth the function of a motion for summary judgment.

In our views, the plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to established the existence of an element essential to that party's case, and on which that party will bear the burden of proof at an essential element of the nonmoving party's case necessarily renders all others facts immaterial.

Evidence Inadmissible

All relevant evidence is admissible, except as other wise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

RULE 702 of the Federal Rules of Evidence provides:

Rule 702. Testimony by Experts
If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in form of an opinion or otherwise.

28 U.S.C. § 2071 (1988) provides, in relevant part:

§ 2071. Rule-making power generally
(a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribe under section 2072 of this title.
(b) Any rule prescribe by a court, other that the Supreme Court, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment. Such rule shall take effect upon the date specified by the prescribing court may and shall have such effect on pending proceedings as the prescribing court may order.

28 U.S.C. § 2072 (1988) provides, in relevant part:

§ 2072. Rules of procedure and evidence; power to prescribe. (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.
(b) Such rules shall not abridge, enlarge or modify any substantive rights. All laws in conflict with such rules shall be of no further force and effect after such rules have taken effect.

The Seventh Amendment to the United States Constitution provides: In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

Proceeding In The United States District Court

The fundamental question in this case is whether a litigant is entitle to relief from Summary Judgment. September 13, 1995, Petitioner acting pro-se, filed a complaint with the United States District Court for the Southern District of Florida, against the Department of Veterans Affairs, with direct discrimination against Petitioner, in which Petitioner filed numerous complaints of charges with EEOC, Grievances, Unfair Labor Charges, and Petitioner ended up in the crisis center. The complaint was based on discrimination and in violation of abridge Petitioner First, Fourth Amendment, and the Fourteenth Amendment rights.

Respondent (Veterans Hospital) allege that Petitioner amended his complaint on a letter dated October 27, 1995. Respondent allege that Petitioner state a cause of action under the Freedom of Information Act, 5 U.S.C. § 552, dropping his employment claim based on the Petitioner letter.

Pursuant to the local rules of the United States District Court:

Rule 15.1 Form of a motion to amend its supporting document. A party who moves to amend a pleading shall attache the original of the amended to the motion. Any amendment to a pleading, whether_ file as a matter of course of upon a successful motion to amend, must, except by leave of court, reproduce the entire pleading as when a motion to amend is granted, the amend pleading shall be filed and served forth with. A failure to comply with the rule is not ground for denial of the motion.

The Petitioner letter did not state a motion to amend, and was not notarize by Petitioner, and the original complaint was not attached to the letter of Petitioner. The Petitioner letter was not sent to the District Court, and was not in anyway intended to amend his complaint.

On February 15, 1996, the Respondent field an answer to the allege amended complaint, and a motion for substitution and dismissal. On March 29, 1996, Respondent filed a Motion for Summary Judgment, including (with incorporated memorandum), and a statement of material facts and Memorandum point and Authorities. On the affidavit of Mr. Anthony Evans filed March 28, 1996 was made to the best of his knowledge information and belief, and should be based on personal knowledge. Federal Rules of Civil Procedure 56, n at 224 page 190.

Petitioner respond to Respondent on Motion for Summary Judgment in opposing and Petitioner filed Motion to Strike (R3:108,113,116,117),(R4:139),(R6:239),(R7:254), Respondent Motion for Summary Judgment. Petitioner amend submitted exhibits of motion to strike Summary Judgment (R3:117), Petitioner requested to amend complaint (R3:109), Petitioner filed a protective order for Summary Judgment (R5:152). District Court denied all request of Petitioner which reflects on the docket sheet. Petitioner submitted interrogatories to Respondent and it was denied by the District Court. On January 6, 1997, (R6:215) Petitioner filed a memorandum for Summary Judgment and reconsideration to the District Court. Respondent depose Petitioner, Petitioner submitted the deposition to defeat Respondent Motion for Summary Judgment, and it was denied the District Court. Petitioner was not given the (10) days notice of the Summary Judgment. Here at hand, Petitioner was denied all of his request made to the District Court, and knowing that Petitioner has a claim to proceed to trial, which also resulted in a miscarriage of justice.

On January 27, 1998, the District Court, ruling on the Motion for Summary Judgment, granted Respondent (VA Hospital) Motion for Summary Judgment holding that there was showing that Petitioner (Jose Hoyos) had filed his action based on the Freedom of information Act, 5 U.S.C. 552 (a) (b) in deciding that there is no genuine dispute exist as to any material fact in favor to Petitioner. On an order dated February 6, 1998, from the District Court, Petitioner is prohibited from filing any further papers in this court without a permission of a United States District Judge. The District Court denied Petitioner to amend his complaint.

On February 10, 1998, Petitioner filed a Notice of Appeal with the clerk of the United States District Court, Southern District of Florida, appealing the Order granting Summary Judgment in favor of Respondent (VA Hospital). Petitioner challenged all of the Orders of the District Court, and Petitioner was denied all of his request to the District Court, knowing that Petitioner had a vital claim.

On Appeal, United States District court, Southern District of Florida, holding that Petitioner letter dated October 27, 1995 was admitted and was not defective on the face, rendering inappropriate the granting of Summary Judgment on the record as it stood before the District Court. Thus the District Court did not reach the evidentiary issue (App. D).

The Court determined that Respondent merely pointed to Petitioner inability to produce evidence to support his claim, and the Petitioner offer no affidavit, declarations or evidence of any sort to support its Motion. Thus, the Court did not held that Petitioner need to come forward with evidence to opposed Respondent motions for Summary Judgment.

REASON FOR GRANTING THE WRIT

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULING ON THE ESSENTIAL DUE PROCESS RIGHT OF A LITIGANT TO A COMPETENT AND IMPARTIAL TRIER OF FACTS

The Petitioner petition for writ of certiorari should be granted because the opinion conflicts with this Court's important prior ruling on a litigant's fundamental due process right to a fair trial. Further, the majority opinion contracts established case law of this Court and Appeals Court in allowing a party to oppose a summary judgment motion with admissible evidence. The Eleventh Circuit's decision below stretches the concept of inherent judicial power, well beyond the breaking point trampling over Federal Rule Evidence, 402. In so doing, the decision bypass that procedural safeguard for evidence rulemaking set forth by Congress in 28 U.S.C. §§ 2071-2072. The power of the federal court--including even this Court to prescribe rules of procedure and evidence for federal court's exist only in the absence of relevant Act of Congress. Palmer v. United States, 360 U.S. 343, 353 n. 11 (1959).

All relevant evidence is admissible, except as other wise provided. 1. by the Constitution of the United States, 2. by Act of Congress, 3. by these rules or 4. by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

ARGUMENT

The Eleventh Circuit in Fitzpatrick v. City of Atlanta, 2 F.3d 1112 1116-1117 (11th Cir. 1993), addressed with specificity, Plaintiff's burden as the non-movant for summary judgment on issues for which Plaintiff bears the burden of proof at trial:

> For issues on which the non-movant would bear the burden of proof at trial, the means of rebuttal available to the non-movant vary depending on whether the movant put on evidence affirmatively negating the material fact or instead demonstrated an absence of evidence sufficient to withstand a directed verdict motion at trial on the material fact sought to be negated. Where the movant did the latter, the non-movant must respond in one of two ways: First, he or she may show that the record in fact contains supporting evidence, sufficient to withstand a direct verdict motion, which was "overlooked or ignored" by the moving party, who has thus failed to meet the initial burden of showing an absence of evidence. Celox, 477 U.S. at 332, 106 S.Ct. 2557 (Brennan, J., dissenting). Second, he or she may come forward with additional evidence sufficient to withstand a direct verdict motion at trial based on the alleged evidentiary deficiency.

A Court may not enter summary judgment sua sponte without providing a minium of 10 days' to the parties are required by the Federal Rules of Civil Procedure. 6 Moore's Federal Practice ¶56.10. According to the majority opinion in this case, however, summary judgment would not be proper in Bald Mountain Park v. Oliver, 863 F.2d 1560 (11th Cir. 1989); WSB-TV v. Lee, 842 F.2d 1266, 1269 (11th Cir. 1988); Rollins v. TechSouth, Inc., 833 F.2d 1531, (11th Cir. 1987), unless the moving party produced some evidence to support its position.

In addition, the First Circuit in Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988); Knight v. U.S. Fire Insurance Co., Commissioners, 834 F.2d (2d Cir. 1987). The majority holds that a party must support a motion for summary judgment with "some evidence". In the Third Circuit in Williams v. Borough of West Chester, Pa., 891 F.2d 468 (3rd Cir. 1989); Yoash v. McLean Contracting Company, Inc., 907 F.2d 1481 (4th Cir. 1990); Ballinger v. North Carolina Agricultural., 815 F.2d 1001 (4th Cir. 1987). This requirements places an insurmountable burden on the moving party, if as in the present case, a material fact is plainly undemonstrable. Rule 56(b) of the Federal Rules of Civil Procedure permits a party to "move with or without supporting affidavits for a summary judgment".

The Fifth Circuit has stated its standard for summary Judgment in Washington v. Armostrong World Industries, Inc., 839 F.2d 1121 (5th Cir. 1988); the movement must present more than a metaphysical doubt about the material facts. Furthermore, under Rule 56 (c) the moving party is not required to make an evidentiary showing, and, pleadings. 6 J. Moore, Moore's Federal Practice ¶56[1.[2] at 209 (1985). In the Sixth Circuit in Street v. J.C. Brandford & Co., 866 F.2d 1472 (6th Cir. 1989); which states that the movement must meet the initial burden of showing "the absence of the genuine of material fact" as to an essential element of the nonmovant's case, after having sufficient time for discovery. Beard v. Whitley County REMC, 840 F.2d 405 (7th Cir. 1988) City of Mt. Pleasant, Iowa v. Associated Electric Cooperation, Inc., 838 F.2d 268 (8th Cir. 1988).

The District Court, must determine precisely what evidentiary materials are before it. A court generally should not rely on unsworn or unauthenticated documents in determined a summary jugdment motion, Macklin v. Butler, 553 F.2d 525, 528, (7th Cir. 1977), but may do so in the absence of objection. Townsend v. Columbia Operation, 667 F.2d 844, 849 (9th Cir. 1982). To be admissible, documents must be authenticated by and attached to an affidavit that meets the requirements of Rule 56 (e) and the affiant must be a person through the exhibit could be admitted into evidence. Petitioner object to the letter that was not made under oath. 10 A C. Wrigh, A. Miller and M. Kane, Federal Practice and Procedure § 2722 (2d 1983). (App. D).

Respondent argues that Petitioner letter dated October 27, 1995 was admitted as amended complaint. More importantly, Petitioner objected to the letter which appear in the court's docket sheet as (R3:108,116); (r6:239). Letters are not among the specific materials listed in Rule 56, and the Petitioners letters is admissible hearsay. It was not made under oath, and does not purport to be based on personal knowledge. The letter does not fall under Fed. R. Evid. 803(6). The letter was written to respond to inquires that were made in the course of this litigation. Palmer v. Hoffman, 318 U.S. 109, 111-15, 63 S.Ct. 477, 479-81, 87 L.Ed. 645 (1943). Summary Judgment should not be granted until Petitioner had adequate time for discovery. Snook v. Trust Co., of Ga Bank of Savannah, N.A., 859 F.2d 965 (11th Cir. 1988).

If party chooses to untilize an affidavit in connection with summary judgment motion, the affidavit must be based on personal knowledge. "6 J. Moore, Moore's Federal Practice ¶56.24[1]. Affidavit must contain evidence that would be admissible at trial.

THE PETITION SHOULD BE GRANTED BECAUSE THE ORDER OF OF THE APPEALS COURT BELOW DIRECT CONFLICT WITH THIS COURT'S ON PRIOR RULINGS ON THE CRUCIAL ROLE OF A DISTRICT COURT JUDGE AS A TRIER OF FACT

In the order below, the Eleventh Circuit implies that Petitioner have suffered no prejudice because, even if Judge Joan A. Lenard contradicts the Supreme Court cases, Matsushita, Liberty, Lobby, and Celotex, handed down in 1986, in which it was affirmed by all competent court's of appeals. (App. B). By doing so, the District Court, failed to acknowledge the Supreme Court decisions, as well as the Eleventh Circuit which failed to abide the Supreme Court of the United States. (App. A). This Court outlined the nature and rationale underlying this limited standard of review in Anderson, Liberty, Matsushita, there, this Court explained that "the rationale for summary judgment of the finder of facts, is not limited to the superiority of the trial judge's position to make a determinations of credibility. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 1698, 26 L.Ed.2d 142 (1970). "Its not part of the court's function, when deciding a motions for summary judgment, to decide issues of material fact, but rather decide whether such issues exist to be tried. The Court must avoid weighing conflicting evidence or making credibility determinations." Citing Anderson v. Liberty. Thus, the majority's opinion elevates unsupported speculation over this Court's ruling that, to avoid summary judgment, a plaintiff" must do more that simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586.

It eviscerates that requirements that a plaintiff come forward with "more persuasive evidence" when, as here, a claim makes no economic sense. Indeed, the analysis evidence at all, even when their claims are contrary to sound, indeed admitted, economic logic. Respondent failed to come forward with evidence to defeat Petitioner Summary Judgment, and Respondent relied on Petitioner letter.

The Court of appeals for the Eleventh Circuit, relied heavily on Judge, Joan A. Lenard, District Judge, on the Motion for Summary Judgment and expertise as the trier of fact. By implying otherwise, the Eleventh Circuit stating that Petitioner frivolously sued just about everyone, and express to cut-off Petitioner access to court in the future, regardless if Petitioner would have a claim in the future, in violating Petitioner Fourteenth Amendment Rights. Due Process is not serviced for one litigant simply by preventing others from suffering similar violations of their due process rights in the future. For this reasons, as well, Petitioner for writ should be granted.

CONCLUSION

This case presents a question of exceptional importance-whether a litigant is entitle to relief from a Summary Judgment from the District Court for the Southern District of Florida and the United States Court of appeals for the Eleventh Circuit, in which the (Appeals Court) deliberately refuse to follow the applicable Supreme Court decisions in which the Court of Appeals has misconstrued, misapplied, misconceived and applicable Supreme Court cases. The Petitioner has been denied due process and will forever suffer without the consequences of a decision that my well have rendered without a incompetent Appeals Court. By granting the Petitioner petition for certiorari, however, this Court can correct the Eleventh decision, which defies this Court's longstanding holdings that a litigant has a due process right under the Motion for Summary Judgment. In so doing, this court can also grant certiorari that important role played by the district court judges as a trier and finder of fact.

Accordingly, the Petitioner prays that this Court vacate and remand for further proceedings after plenary consideration by this Court.

Respectfully submitted

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Supreme Court, U.S.
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99 644 JUN 22 1999

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APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

20pp

APPENDIX A-OPINION·ORDER ELEVENTH CIRCUIT·DATE·
FEBRUARY 1, 1999

IN THE UNITED STATES COURT OF APPEALS FOR THE

THE ELEVENTH CIRCUIT

No. 98-4178
Non-Argument Calendar

D.C. Docket No. 95-2256-CIV-LENARD

Jose J. Hoyos, Individually and
on behalf of all other persons
similarly situated,

Plaintiff-Appellant,

versus

United States Of America,
Department of Veterans Affairs, et al.,

Defendant-Appellees.

Appeal from the United States District
Court for the Southern District of Florida

(February 1, 1999)

Before Anderson, Carnes and Marcus, Circuit Judges.

PER CURIAM:

Appe. A

Jose Hoyos appeals two orders of the district court that, respectively, (I) granted summary judgment to the United States in his pro se lawsuit for failure to comply adequately with his Freedom of Information Act ("FOIA") request for records, and (ii) prohibited him from filing any further papers in the United States Court for the Southern District of Florida without a judge's permission. The instant case stems from an employment dispute regarding Hoyos' termination from the Veteran's Administration-hospital in Miami, Florida ("VA"). Hoyos originally filed a complaint in federal district court alleging employment-related causes of action. Subsequently, however, he filed an amended complaint alleging only FOIA violations. That amended complaint, stripped of any averments regarding employment-related issues, necessarily became the operative document. Hence, Hoyos cannot for the first time on appeal resurrect matters that were pleaded in his original complaint but superseded in his amended complaint.1

We find that Hoyos' challenges to each of the-district court's orders are without merit. With-respect to the summary judgment order, Hoyos' cause of action was under 5 U.S.C. § 552 (a)(4)(B) to-obtain records that he alleged the VA wrongfully-withheld from a FOIA request he submitted on October 27, 1995. Specifically, Hoyos south "the names and addresses of all the federal employee's [sic] and the reason for their removal from the VA Hospital in Miami Florida. From 1970 through present. [sic]"2 Interpreting this as request for information on all

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1 To the extent that Hoyos' mostly unintelligible argument on appeal includes a contention that the district court erred in denying him leave to amend his complaint a second time to re-allege the original wrongful discharge cause of action, from our independent review of the record it appears that he never attempted to amend his complaint to re-allege that cause of action. Although he repeatedly moved to amend and was denied on various grounds, these motions dealt with other matters, such as adding or substitution or defendants.

federal employees who had been involuntarily removed or discharged for cause from the VA, the government provided the reasons for removal, but withheld the names and addresses of individuals, citing FOIA-exemption 6, 5 U.S.C. § 552(b)(6), which exempts from FOIA's coverage "personnel and medical files and other files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." In FOIA litigation, the government has the burden of proving that an exemption was properly invoked in its decision to withhold information. Ely v. Federal Bureau of Investigation, 781 F.2d 1487, 1489-90 (11th Cir. 1986). The determination as to whether the release of information would constitute a "clear unwarranted invasion of personal privacy" requires a balancing of the individual privacy interests at stake againts the public interest, if any, in disclosure. U.S. Department of State v. Ray, 502 U.S. 164, 175-76 (1991). We agree with the district court that releasing the indentities of individuals fired from the VA would be a clearly unwarranted invasion of personal privacy and that there is little public interest in access to those identities, especially when the reasons for removal--the information that truly bears upon the agency's conduct, which is the focus of FOIA's concern-were readily made available. Cf FLRA v. U.S. Department of Defense, 977 F.2d 545, 547-49 (11th Cir. 1992) (holding that individuals have as significant privacy interest in their addresses and that no public interest would be served by providing a labor union with a listing of the addresses of non-union federal employees). In addition, Hoyos's argument that the affidavit of Anthony D. Evans (the responsible official for FOIA compliance at the VA) in support of the

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2 In his October 27, 1995 letter, Hoyos also requested grade/salary, job title, and permanent work-location information for ten, specifically-named employees. The VA apparently complied with this request, except that information on one of the ten individuals wa not available because he was retired, and Hoyos apparently does not complain about this aspect of the FOIA request.

government's motions for summary judgment was insufficient because made without personal knowledge is wholly without merit. 3

We hold also that the district court's prohibiting Hoyos from engaging in further litigation without permission was warranted. The record reflects that in the instant case and related case, Hoyos has frivolously sued just about everyone even remotely associated with the VA, has moved to disqualify magistrate judges and district court judges for no reason other than that they ruled against him, has propounded voluminous discovery, has filed complaints regarding attorneys in the case with the Office of Professional Regulations, and has burden the-district court with over 130 motions and notices, many of them duplicative. The mountain of papers that Hoyos needlessly created is disruptive and puts a substantial burden on the district court and diverts resources from other cases. The district courts injunction is not an absolute bar; further litigation will be permitted if Hoyos obtains permission. We have upheld pre-filing screening restrictions on litigious plaintiffs

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3 Hoyos argues also that summary judgment was improper because the district court did not give him ten days notice required by Fed. R. Civ. 56(c) as interpreted by Griffith v. Wainwright, 772 F.2d 822, 825 (11th Cir. 1985). That case requires that "an adverse party must be given express, ten-day notice of the summary judgment rules, of his right to file affidavits or other material in opposition to the motion, and of the consequences of default," Id. We have recognized a harmless error exception to the ten-day notice rule in Donaldson v. Clark, 819 F.2d 1551, 1555 n.3 (11th Cir. 1987) (en banc), and Denis v. Liberty Mut. Ins. Co., 791 F.2d 846, 850 n.6 (11th Cir. 1986),

in factually indistinguishable, see Martin-Trigona v. Shaw, 986 F.2d 1384, 1387 (11th Cir. 1993), and feel that the district court was well within its discretion in imposing this order. 4

AFFIRMED.

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where the party who lacked notice nevertheless submitted all of the evidence he would have produced had he received notice, and demonstrated awareness of the proper standard under Rule 56. The harmless error exception applies here. The granting of summary judgement depended on a discrete legal issue: whether Exemption 6 to FOIA covered Hoyos' request. Cf. Miscavige v. IRS, 2 F.3d 366, 369 (11th Cir. 1993) noting that generally, FOIA cases should be handled on motions for summary judgment once the documents at issue are properly identified). The district court had before it all of the material documents that it needed to decided that question, and submitting additional evidence would have served no purpose.

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4 No constitutional problem is raised by pre-filing screening restriction such as those in the instant case. Procup v. Strickland, 792 F.2d 1069, 1073-74 (11th Cir. 1986) (en banc).

APPENDIX B-ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT FROM THE DISTRICT COURT DATED JANUARY 27, 1998.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JOSE J. HOYOS,

Plaintiff,

vs.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS,

Defendant.
_____/

THIS CAUSE comes before this Court Defendants motion for summary judgment (D.E.104).

In October 1995, Plaintiff Jose Hoyos (Hoyos) filed this action, based upon the Freedom of Information Act (FOIA), 5 U.S.C. & 552a(b), against Defendant United States Department of Veterans Affairs (Veterans Affairs), to obtain the personnel records of all employees of the Veterans Affairs Hospital in Miami who have left employ of the hospital since 1970. Veterans Affairs subsequently provided Plaintiff with all the files requested, except those of hospital employees who had been fired. With respect to discharged employees, Veterans Affairs has provided Plaintiff with the reason for its dismissal of each of the employees, but has refused to give Plaintiff those employees' names and addresses, claiming that such information is exempt from disclosure under 5 U.S.C.(b)(6).

On March 29, 1996, Veterans Affairs filed a motion for summary judgment. A motion for summary judgment may be granted only if no genuine dispute exist as to any material fact. Fed. Civ. P. 56(c). In deciding whether there is a genuine issue of material fact, the Court must view the pleadings, affidavit and other evidence in the record"in the light most favorable to the non-moving party." Retina Associates, P.A. v. Southern Baptist Hosp. of Florida., 105 F.3d 1376, 1380 (11th Cir. 1997).

Section 552(b)(6)of the FOIA exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clear unwarranted invasion of privacy." 5 U.S.C.§552(b)(6). Veterans Affairs contends that disclosing the names and addresses of the Miami Veterans Affairs Hospital's discharged employees would constitute a clear unwarranted invasion of privacy. A court must balance the private interests of disclosure against the public interests of disclosure in order to determine whether disclosure would constitute a 'clear unwarranted invasion of privacy.' Federal Labor Relations v. U.S. Department of Defense, 977 F.2d 545, 547 (11th Cir. 1992). In United States Department of Justice v. Reporters committee for Freedom of the Press, 489 U.S. 749, 772, 109 S.Ct. 1486, 1481 (1989), the Supreme Court explained that the public has an interest in knowing

> about what their government is up to. Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but reveals little or nothing about an agency's own conduct.

(citations omitted). The names and addresses of discharged Miami Veterans Affairs Hospital employees would reveal nothing about the hospital's conduct. See Federal Labor Relations Authority, 977 F.2d at 547-48. Therefore, the public has no interest in knowing those names and addresses. Furthermore, an employee who has been fired has a significant interest in keeping that information private, if for no other reason than to avoid the possibility of embarrassment. Consequently, this Court must conclude that private interests of Miami Veterans Affairs Hospital's discharged employees outweigh the public interest in access to those employees' names and addresses. Releasing such information to Plaintiff would thus constitute a clear unwarranted invasion of privacy. Accordingly, it is hereby

ORDERED AND ADJUDGED that Defendant Veterans Affairs motion for summary judgment be GRANTED. The Clerk is directed to close this case.

DONE AND ORDERED in Chambers, at Miami, Florida on 27 day of January 1998.

Joan A. Lenard
United States District Judge

cc: Carole M. Fernandez, Esq.
Jose J. Hoyos, Pro Se

APPENDIX C-ORDER FROM ELEVENTH CIRCUIT DENIED PETITION FOR REHEARING DATED MARCH 25, 1999.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-4178

JOSE J. HOYOS, Individual and
on behalf of all other persons
similarly situated,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA
DEPARTMENT OF VETERANS AFFAIRS,
et al.,

Defendants-Appellee.

On Appeal from the United States District Court for
the Southern District of Florida

ON PETITIONS (S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (Opinion_____,11th Cir., 19__, _____F.2d_____).

Before: ANDERSON, CARNES and MARCUS, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc

are DENIED.

Appe(C)

APPENDIX D-AFFIDAVIT OF ANTHONY EVANS LETTER OF PETITIONER DATED OCTOBER 27, 1995.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JOSE J. HOYOS,	
PLAINTIFF,	
	CASE NO.95-2256-CIV-LENARD
vs.	
UNITED STATES OF AMERICA, et al.	
DEFENDANT.	

AFFIDAVIT

ANTHONY D. EVANS, being duly sworn, deposes and says:

1. I am the Supervisor Program Assistant-Release Of Information (ROI) of the Health Information Management Section (136D), Medical Administration Service (136), Department of Veterans Affairs Medical Center, 1201 N.W. 16th Street, Miami, FL 33125. As such, I am the employee responsible for the processing of Freedom of Information Act (FOIA) requests received by the Medical Center. FOIA requests are logged in and routed to the section where the requested information is believed to be maintained. The requested information is returned to my section where it is reviewed and an appropriate response prepared.

2. By letter dated October 27, 1995 (Exhibit 1), to Thomas C. Doherty, Director, Miami VA Medical Center, the Plaintiff, made a Freedom of Information Act (FOIA) request for the following information:

Appen D

a. The grade, salary, job title, and permanent work location for the following federal employees, at the Miami VA Medical Center: Thomas C. Doherty, Wayne Johnson, Larry Brinkman, Catherine Byrd, Juliemer Santiago, Arnold Berkowitz, Diane Nealy, Anthony Soldo, Gregory Rhodes, Robert M. Clark.

b. The names of all the federal employees and the reason for their removal from the VA Hospital in Miami, Florida. From 1970 through present.

3. By letter dated November 13, 1995 (Exhibit 2), the Miami VA Medical Center acknowledge receipt of Plaintiff's FOIA request and informed him the VA was in the process of researching his request. Plaintiff was also given the name and phone number of the Supervisor, Health Information Management Section in the event he had any questions.

The Department of Veterans Affairs Medical Center weighed the public and privacy interests at stake in this instance. The former employees of the agency were determined to have a substantial personal privacy interest in the fact that they had been "removed"/"fired" from employment with the Department of Veterans Affairs (the reasons for the removal actions would not fall within the exemption--see paragraph 8). The agency was unable to identify any significant qualifying public interest in disclosure because the disclosure of the identities of the individuals who were "removed"/"fired" would not reveal any substantial information about the workings of the VA. There being a substantial privacy interest and no significant public interest, release of the information was determined to be an unwarranted invasion of the personal privacy of the former employees. Plaintiff's request for this information was therefore denied.

10. The Department of Veterans Affairs has released all non-exempt information responsive to the Plaintiff's request to the Plaintiff.

I declare under the penalty of law that the foregoing is true to the best of my knowledge, information and belief.

March 28, 1996

ANTHONY D. EVANS
Supervisor, Program Assistant

Sworn and subscribed to before me Miami, Florida March 28, 1996.

(Notary Public)

William H. Biagi

October 27, 1995

Mr. Thomas C. Doherty, VA Director
Department of Veterans Affairs
Miami Medical Center
1201 N.W. 16th Street
Miami, FL 33125

CASE NO. 95-2256

Dear Mr. Doherty:

UNDER THE FREEDOM OF INFORMATION ACT, 5 U.S.C. SUBSECTION 552, I AM REQUESTING ACCESS TO, OR COPIES OF THE FOLLOWING:

1. The grade, salary, job title, and permanent work location for the following federal employee's at the Miami Medical VA Medical Center.

2. Thomas C. Doherty, Wayne Johnson, Larry Brinkman, Catherine Byrd, Juliemer Santiago, Arnold Berkowitz, Diane Nealy, Anthony Soldo, Gregory Rhodes, Robert M. Clark.

3. The names of all the federal employee's and the reason for their removal from the VA Hospital in Miami, Florida. From 1970 through present.

If you deny all or part of this request, please cite each specific exemption you think justifies you refusal to release the information and notify me of appeal procedures available under the law.

Sincerely,

Jose J. Hofos
P.O. BOX 112514
Hialeah, FL 33011-2514

cc: Judge, Ungaro-Benages

APPENDIX E-ORDER OF THE ELEVENTH CIRCUIT JUDGEMENT AGAINST PLAINTIFF PAY COST DATED APRIL 13, 1999.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-4178
Non-Argument Calendar
District Ct. No. 95-2256

JOSE J. HOYOS, Individually and
on behalf of all other persons
similarly situated,

Plaintiff-Appellees,

v.

UNITED STATES OF AMERICA
DEPARTMENT OF VETERANS AFFAIRS,
et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

Before ANDERSON, CARNES and MARCUS, Circuit Judges.

J U D G M E N T

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the records and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the orders of the District Court appealed from in this cause be and the same hereby AFFIRMED;

Appeal. E

It is FURTHER ORDERED THAT plaintiff-appellant pay to the defendants-appellees, the costs on appeal to be taxed by the Clerk of Court.

Entered Feb. 1, 1999

ISSUED AS MANDATE: April 13 1999.